

Death or Bodily Injury on Board the Aircraft: A UAE Perspective

Saif Almobideen

s.almobideen@tamimi.com

May 2016

Amongst several factual issues determined by the Court, aviation law concepts such as the definition of 'accident', 'death', 'bodily injury' were dealt with, as well as liability of an airline generally and liability pursuant to the UAE Federal Law No.17 of 1991 ('For Determining the Legitimate Ransom Amount For the Unintentional Death of a Person') and the UAE Federal Law Mo.9 of 2005 (Amending the Diya Payable for Wrongful Death) (together the 'UAE Blood Money Law'). The case highlights the importance of having a comprehensive understanding of international air law concepts, and an understanding of the particular nuances in UAE jurisprudence and law in dealing with claims for death or bodily injury.

Montreal Convention

The UAE is a signatory to the Montreal Convention 1999 (the 'Convention'), which in turn is enacted within the UAE by UAE Federal Decree No. 13 of 2000 ('Ratifying the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention 1999)'). It has been in force in the UAE since 4 November 2003. The Convention applies to all cases of international carriage of persons, baggage or cargo performed by an aircraft for reward, with carriage having its origin and destination in two different contracting states, or a single state with round trip carriage with an agreed stopping place in another state. In the case of accidents, bodily injury or death on an aircraft, the relevant provision which must be considered is Article 17 of the Convention which provides that 'the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking' (emphasis added).

The particular wording of Article 17 has given rise to a great deal of litigation and case law worldwide and much of this case law is focused on the definition of 'accident' and what is meant by 'bodily injury'.

There may be many occurrences or events on board aircraft which are not an 'accident' for the purposes of the Convention. If one takes the recent example dealt with by Al Tamimi in the Abu Dhabi Court of First Instance, a passenger suffering a heart attack on board an aircraft is not an 'accident' for the purposes of Article 17.

There is a wide body of international case law dealing with Article 17 interpretation of accident both under the Convention (and its predecessor the Warsaw Convention of 1929). In the United States in the case of *Air France v Saks* the US Supreme Court denied recovery to a passenger who suffered deafness as a result of aircraft depressurization, which was a perfectly normal consequence of the normal operation of an aircraft in its landing descent. The Court found that the passenger's injury to the inner ear was caused by the passenger's own inner ear and sinus problems specific to their own body, rather than by anything 'unusual or unexpected' about the operation of the flight. The US Supreme Court concluded that an accident under Article 17 arises only if the passenger's injury is caused by an unexpected or unusual event or happening which is external to the passenger.

In *Kyrs v Lufthansa*, a passenger suffered a heart attack on a transatlantic flight from Miami to Frankfurt

and commenced proceedings against Lufthansa for aggravating the damage to the passenger's heart by not landing the aircraft so that the passenger could immediately go to hospital, before it was scheduled to arrive in Frankfurt. The US Court of Appeal concluded that the aggravation injury was not caused by an unusual or unexpected event or happening that is external to the Plaintiff, and so did not constitute an accident within the meaning of the (Warsaw) Convention.

In the United Kingdom, the House of Lords case of *In re Deep Vein Thrombosis v Air Travel Group Litigation* dealt with a class action by 55 claimants against 27 airlines alleging that passengers who had suffered from Deep Vein Thrombosis ('DVT') (which was then commonly known as 'Economy Class Syndrome'), were entitled to compensation under Article 17. The allegation was that passengers sitting in a cramped position for long periods of time caused the formation of blood clots in the body which could cause a stroke or heart attack, paralysis or death. The House of Lords held that DVT and related illnesses such as thrombosis and embolisms are not accidents within the meaning of Article 17 of the Convention. The failure to warn of the risk of DVT is not an accident either.

In *Ford v Malaysian Airlines System Berhard* it was held that the administration of an injection by a medically qualified person to treat another passenger, which seemed to worsen the passenger's condition rather than improve it, was not an accident. This action was not part of the usual, normal, and expected operation of the aircraft as per *Saks v Air France*, but the administration of an injection by a doctor in the hope and expectation that it would relieve the condition complained of, was a usual and expected event and therefore did not constitute an accident.

In *Singh v Caribbean Airlines Limited*, it was held that as long as the crew did not depart from the airline's policies and procedures in responding to a medically ill passenger, there was no accident. In *Safa v Lufthansa* the crew's response to an immediate medical issue largely followed the airline's policies and procedures, and again there was no accident.

Nevertheless there are cases where there can be recovery under Article 17. In *Olympic Airways v Hussain*, the US Supreme Court again considered the definition of 'accident' from *Air France v Saks*, which was that liability arises only if the passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. In the *Olympic* case the passenger had died on board the flight because he was allergic to second hand cigarette smoke. His wife had asked the flight attendant to move him to a seat further away from the cigarette smoke and the flight attendant had falsely informed her that there were no vacant seats. The Court held that any change in the causal link had to be an unexpected or unusual event or happening that is external to the passenger, and the flight attendant's failure to lend assistance to such an event constituted an accident. It is worth noting that in the same case, in a dissenting judgment denying the claim, Justice Scalia followed case law from Australia and United Kingdom which held that inaction cannot be an event, and instead was a non-event, and therefore not an accident under Article 17.

Another issue under Article 17 is whether psychological damage can be recoverable in addition to 'bodily injury'. The US Supreme Court, in *Eastern Airline v Floyd*, concluded that recovery under Article 17 of the (Warsaw) Convention required either 'death' or 'bodily injury' and emotional damage alone would not suffice even though this was a case in which the flight lost power in all three engines and was preparing to ditch the aircraft in the ocean whereupon one of the engines restarted and the plane landed safely. The Court concluded that an air carrier cannot be held liable under Article 17 when an accident does not cause a passenger to suffer death, physical injury, or physical manifestation of injury.

In the UK, the House of Lords decision of *Morris v KLM Royal Dutch Airlines* addressed the issue of whether a 16 year old girl could recover damages under Article 17 for clinical depression suffered after another passenger sexually assaulted her aboard a flight from Kuala Lumpur to Amsterdam. It was concluded that Article 17 does not allow a person to recover for emotional damage.

As can be seen from above, the concepts of accident, bodily injury and the wording of Article 17 does give

rise to a great deal of case law worldwide. In the UAE matter dealt with by Al Tamimi, Convention cases and concepts were highly relevant as were the bespoke issues of local Sharia law and local procedures in the UAE Court.

The Plaintiffs were the family heirs to the deceased passenger and they lodged a claim for compensation of material, moral, physiological damages and Diya (blood money) against the airline for liability under Article 17 of the Convention, Terms of Contract of Carriage, Sharia Law, and UAE Civil Law. The Plaintiffs claimed that in addition to Diya they sustained psychological, tangible, and intangible damage.

Under UAE law, the amount of compensation that may be granted to the heirs in the event of wrongful death is called Diya. Pursuant to Article (1) of UAE Determining Blood Money Law, if a wrongful death is proven, AED 200,000 may be awarded without proving any damage which may have been suffered by the heirs. Moreover, the heirs may be entitled to compensation for moral, physical, and psychological damage in an event of a wrongful death of their bequeather, pursuant to the Federal Law No. 5 of 1985 (the 'UAE Civil Transaction Law'), subject to proof of such damage and the establishment of three precondition elements of a claim in tort, namely; (i) fault; (ii) damage; and (iii) a causal link between such fault and the damage. If such damages are proved and the preconditions are met, the Court's estimation of damage would range between AED 50,000 to AED 500,000.

Factually, the passenger was taken ill on board a flight from Washington bound for the UAE. An hour passed from the time of the onset of symptoms to the passenger's eventual death by heart attack. During this time the passenger was attended to by two onboard doctors, and medical care was administered, which included the use of a defibrillator and an electro cardiogram. The incident took place whilst the aircraft was flying over the sea.

In the UAE Courts, it is usual in such matters for the courts to appoint an expert with knowledge of aviation matters. In this case, the expert was able to establish that the airline was not responsible for the death, which was caused by a heart attack internal to the passenger. An emergency landing would have been difficult given that the aircraft was above the sea and the incident from start to finish lasted approximately one hour, which was not sufficient for an emergency landing. The crew were not advised by Medlink (the methodology by which aircraft crew contact medical professionals on the ground for medical advice) to make an emergency landing, and the Defendant provided the deceased with all medical care required to deal with a heart attack, including two on board doctors. As established by laws and precedents, the Court was able to rely on the expert's report and the Court was not bound to return the assignment to the expert as the report had dealt fully with all the Plaintiffs' objections. The Court found that there could be no liability on the part of the airline for an act of God.

In this particular case, the Court appointed expert was extremely knowledgeable on aviation issues and dealt with the matter professionally and fairly. Given the reliance the court places on expert reports, it is a reminder of how important it is for legal advisors to attend expert's appointments and to fully brief the expert regarding the facts which occurred on board the aircraft as well as the legal and safety regimes which are pertinent to international aircraft travel. It is also important to be aware that the Convention is a comprehensive international treaty that deals with issues of international air law. Nevertheless, a thorough knowledge of local procedure and concepts of Sharia law are also required, and the importance of the appointment of a suitably qualified Court expert to facilitate the correct process of aviation liability litigation in the UAE cannot be overstated.

The case serves as a practical example as to how the UAE Courts may interpret and tackle claims for deaths on board airplanes, especially where an ordinary death has occurred. It must be borne in mind that although this judgment is a final judgment issued by the Abu Dhabi Court of First Instance, which has not been appealed by the Plaintiffs before any of the higher courts, it nonetheless helps clarify and rebut arguments often raised regarding the meaning of 'accident' referred to in Article 17 of the Convention. In addition, the UAE Court affirmed by this judgment its legal position on the extent of imposing Diya, which is that heirs shall not be entitled to claim when a death occurs as an Act of God, and where no act or

negligence from the part of the carrier is established.